1. S.B.CIVIL MISC. APPEAL NO.586/2007.
(National Insurance Company Ltd. Vs. Kur Singh & ors.)

2. S.B.CIVIL MISC. APPEAL NO.813/2007.
(National Insurance Company Ltd. Vs. Smt.Devli & ors.)

DATED : 26th March 2007

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Reportable Mr.Jagdish Vyas, for the appellant.

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BY THE COURT:

These two appeals, CMA Nos. 586/2007 and 813/2007, preferred by the insurer of the vehicle (a truck bearing registration No. HR 38 D 3267) involved in accident against the common award dated 04.09.2006 made by the Motor Accidents Claims Tribunal [Additional District Judge (Fast Track) No.6], Udaipur in Claim Case Nos. 613/2005 and 603/2005 involving common questions have been heard together; and shall be governed by this common order.

Background facts leading to these appeals could be noticed thus: On 17.09.2003 at about 4.30 p.m., in front of M.S.W. College at Pratap Nagar, Udaipur the victim Kanna alias Kishanlal was driving a tractor bearing registration No. RJ 27 R 1540 and towing the said truck bearing registration No.

HR 38 D 3267 that had developed some mechanical fault; and in the process, the towed truck gained speed but could not be controlled by its driver and bounced upon the tractor. In the result, the tractor was damaged and the tractor driver sustained fatal injuries. Two claim applications were submitted against the driver, owner, and insurer of the truck aforesaid; one by the dependents of the tractor driver Kanna alias Kishanlal and another by the owners of the tractor claiming compensation respectively for the loss suffered due to accidental death of Kanna @ Kishanlal and for property damage. The insurer of the truck (present appellant) contested the claim applications with the submissions, inter alia, that there had not been any negligence on the part of the truck driver.

After framing of necessary issues and taking evidence, the Tribunal found with reference to the statement of eye-witness AW-2 Vijay that the tractor driver was towing the truck with his tractor towards Transport Nagar at the request of the truck driver; that on a downward slope the truck suddenly gathered speed; that the truck driver was unable to control his vehicle that climbed upon the tractor; and that the tractor driver Kishanlal died on the spot on being crushed beneath the wheels of tractor. The Tribunal also referred to the police investigation papers whereby challan was filed for offence

under Section 304 IPC against the truck driver Harshvardhan. After rejecting other objections raised by the insurer of alleged violation of policy conditions, the Tribunal proceeded to quantify compensation payable to the dependents of victim, about 25 years of age, at Rs.4,70,000/- and towards property damage to the owners of the tractor at Rs.21,000/- and mulcted liability upon the appellant-insurer.

Assailing the award aforesaid, learned counsel for the appellant-insurer Mr Jagdish Vyas emphasized that award of compensation on an application under Section 166 of the Motor Vehicles Act, 1988 could be made only upon proof of negligence in use of motor vehicle and submitted that in the present case, admittedly, the truck had suffered mechanical breakdown and was being towed by the tractor; obviously, the truck driver have had no control on his vehicle that was not being driven at all; and the truck driver being not at fault, the claim for compensation, whether for bodily injuries or for property damage, ought to have been rejected. Learned counsel strenuously contended that on indisputable fact situation of the present case, it could not have been concluded that the accident occurred for rash or negligent driving of the truck in question or for any negligent act on the part of the truck driver. Learned counsel further urged that the injuries upon the person of the tractor driver and so also damage to

the tractor were the results of voluntary act of the tractor driver who invited the incident by towing a heavier vehicle from the tractor; and hence, according to the learned counsel, no claim for compensation was maintainable against the persons related with the truck.

Having given anxious consideration to the contentions urged and having examined the impugned award this court is satisfied that these appeals remain bereft of substance and deserve rejection *in limine*.

The submission that the disabled truck was not being driven but was being pulled by the tractor and hence there cannot be any liability on the basis of negligence of the truck driver remains fundamentally incorrect. It is to be imbibed that the cause for compensation under the Motor Vehicles Act arises when the loss is caused by the use of motor vehicle and not for driving alone. The Hon'ble Supreme Court in the case of Kaushnuma Begum Vs. New India Assurance Co. Ltd.: 2001 ACJ 428, while adopting the strict liability rule stated in Rylands v Fletcher: (1861-73) All ER 1 in the claims for compensation made in respect of motor vehicle accidents, has laid down:

> "11. It must be noted that the jurisdiction of the Tribunal is not restricted to decide claims arising out of negligence in the use of motor vehicles. **Negligence is only one of the species of the causes of action for making a claim for**

> **compensation in respect of accidents arising out of the use of motor vehicles. There are other premises for such cause of action**."
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> (emphasis supplied)

Following the principles in Kaushnuma Begum (supra), this court in the case of Ali Khan Vs. Vijay Singh: 2006 RAR 102 has pointed out,-

> "A cause to maintain a claim for compensation arises not merely for rash and negligent driving of a motor vehicle but it arises out of the use of motor vehicle. Driving is one of the uses of motor vehicle and even if the act of driving itself is performed by the driver with all skill and caution, yet if the use of vehicle causes injury to a person or damage to a property, **it cannot be said that merely because there was no fault in driving, no cause for compensation arises.**
>
> (emphasis supplied)

and further,-

> "It is, therefore, apparent that the principles emanating from the case of Rylands Vs. Fletcher of strict liability of the person using anything which could be classified as dangerous thing have been adopted to consider liability in torts if an injury is caused because of such use. The motor vehicles, vis-a-vis the human beings and their property, obviously answer to the description of 'dangerous thing' for the purpose of strict liability rule. Once the strict liability rule is applied, the other species of liability i.e. negligence, ceases to be the prime basis of cause of action and, instead, **a person is responsible even for accidental harm even though he is not guilty of either wrongful intent or negligence.** These are the cases where the defendant has a duty of "ensuring safety" to the others."
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> (emphasis supplied)

It cannot be said that merely because the truck could earlier be not propelled on its engine and was being towed, there cannot be a cause to claim compensation if harm was caused by the truck while being towed. Whether moving of its own or being pulled along, the truck remained a 'motor vehicle' nevertheless. A motor vehicle has comprehensively been defined as any mechanically propelled vehicle adapted for use upon roads, whether the power of propulsion is transmitted thereto from an external or internal source [*vide* Section 2(28) of the Motor Vehicles Act, 1988]; and the persons related with the truck would necessarily remain answerable when the truck would cause any loss to person or property.

It may also be observed that merely because the truck was being pulled, it cannot be said that it was not "in use"; and the appellant is not justified in assuming that the truck driver was under no duty to ensure safety of the tractor and its driver. Rather, in the present case the duty was of higher degree as the truck had developed a snag and was being towed at the request of the truck driver. True it is that the tractor was in the process of towing the truck but then, it has clearly been established with the testimony of eye-witness AW-2 Vijay, said to be the Khalasi, that such task of towing the truck was undertaken by the victim tractor driver at the request of the truck driver; and it is borne out that the accident occurred only

because the truck climbed upon the tractor.

When the disabled vehicle was being pulled by another vehicle and during the process bounced upon its retriever, it cannot be said that there was no fault on the part of the truck driver for the occurrence. On the contrary, in the fact situation of this case it is apparent, and from the evidence as produced by the claimants and as omitted to be produced by the non-applicants it is established, that the incident occurred exclusively for the fault of the truck driver. When the vehicle had already suffered mechanical breakdown and was in the process of being pulled by another vehicle, it was required of the truck driver to have taken extra care and caution to guard against any mishap and it cannot be said that for such occurrence of the truck ramming into and bouncing upon the tractor, the truck driver was not responsible. Even in an ordinary use of vehicle, the user owes a duty to ensure safety of others and in the present case, the duty was moreover onerous when the truck driver knew that the truck was being pulled by a tractor. In the process of towing another vehicle, the tractor driver, driving the vehicle in front, was not to imagine that the following vehicle would bounce upon him; and when the truck had gathered speed for whatever reason, the last opportunity to avoid the incident by applying brakes and

preventing the truck coming in contact with, or giving a push to, the rear of the tractor was with the truck driver only. The responsibility towards the incident remains squarely with the truck driver.

The submission that the tractor driver victim invited the incident himself by towing the heavier vehicle based in essence on the maxim *volenti non fit injuria* deserve to fail in this case in law as well as on facts. It may be noted that such kind of defence could have been raised only if the injuries arose out of a risk in respect of which the non-applicants did not owe any duty to the claimants, or in respect of which they had fulfilled such duty as they owed. In such a situation, the action for compensation would have failed whether or not the tractor driver ran the risk voluntarily, since the truck driver had done him no wrong at all.

Moreover, such defence of *volenti non fit injuria,* akin to the defence of contributory negligence, cannot be countenanced unless basic facts are proved by the non-applicants by adducing cogent evidence. Merely because in common parlance a truck is perceived as a bigger or heavier vehicle, it cannot be assumed that a stranded truck cannot be towed by a tractor; nor does it appear a sound proposition that for such towing only the tractor driver is to be blamed. It has nowhere been shown on record if the incident occurred for any

mistake, fault, or error on the part of the tractor driver and in fact, the non-applicants have chosen not to lead any evidence either in rebuttal of the core facts established by the claimants or in support of their defence plea. It has also not been shown as to what was the weight of the truck and what was the engine capacity of the tractor concerned. Moreover, when the truck driver Harshvardhan has not been produced in evidence an adverse inference is definitely required to be drawn for withholding of this relevant witness.

Conclusion is inevitable that the incident occurred by the use of the offending vehicle, i.e. the truck bearing No. HR 38 D 3267; for the fault and mistake of the truck driver; and for no contribution to the incident or the injuries by the tractor driver. The principles aforesaid as stated in Ali Khan apply with full force and from all angles to the facts of the present case; and it is apparent that the truck driver has failed to ensure safety of the victim and victim's vehicle; and the persons related with the truck in question remain liable for the loss caused to the respective claimants.

The finding on responsibility towards accident does not suffer from any infirmity and calls for no interference at the instance of the appellant, insurer of the offending vehicle.

No other point has been urged and the finding on

responsibility towards accident not calling for interference, these appeals remain bereft of substance.

The appeals, therefore, fail and are dismissed summarily.

If the appellant-insurer has not deposited the amount payable under the award in question, it shall deposit the same within 30 days from today with the Tribunal.

(DINESH MAHESHWARI), J.

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